

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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MARIO CAVEN,

Petitioner,

Case No. 1:05-cv-140

v.

Honorable Paul L. Maloney

HUGH WOLFENBARGER,

Respondent.

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**ORDER REGARDING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL  
AND DENYING CERTIFICATE OF APPEALABILITY**

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. On September 26, 2008, the Court entered an opinion and final order dismissing the petition. The Court also denied Petitioner a certificate of appealability. The order of dismissal followed the Court's de novo review of Petitioner's objections to the report and recommendation of the magistrate judge. The Court of Appeals for the Sixth Circuit also denied Petitioner a certificate of appealability on February 26, 2010, and the United States Supreme Court subsequently denied a petition for writ of certiorari on October 4, 2010.

Nearly three years later, Petitioner filed a motion for relief from judgment claiming that this Court's order of dismissal should be vacated because the Court failed to rule on his motion for summary judgment before issuing its opinion and final order. The Court denied Petitioner's motion on October 3, 2013. The Court subsequently denied Petitioner's motion for reconsideration on November 14, 2013. Petitioner now has filed a notice of appeal with regard to the Court's order

denying his motion for relief from judgment, along with a motion for leave to proceed *in forma pauperis* (docket #96) and a motion for certificate of appealability (docket #97).

Federal Rule of Appellate Procedure 3(e) provides that the appellant must pay all required fees at the time a notice of appeal is filed with the district court. The docketing fee for a case on appeal is \$500.00. *See* 28 U.S.C. § 1913; Court of Appeals Miscellaneous Fee Schedule §§ 1, 11 (Nov. 1, 2011). In addition, under 28 U.S.C. § 1917, a \$5.00 filing fee must be paid to the district court. Petitioner has failed to pay the required fees.

Petitioner was permitted to proceed before this Court *in forma pauperis*. Pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure, he may continue that status on appeal unless this court certifies that his appeal is not taken in good faith. Good faith is judged objectively, and an appeal is taken in good faith when it seeks review of an issue which is not frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1961). Detailed reasons for denial of Petitioner's motion for dismissal of the petition were provided in the Court's order denying Petitioner's motion for relief from judgment (docket #92). The Court reaffirms its decision and finds that the issues on which Petitioner might seek review are frivolous. The Court, therefore, certifies that the appeal is not taken in good faith. If Petitioner wishes to proceed with his appeal, he must pay the \$505.00 appellate fee to the Clerk of this Court within 28 days of this order. *See* 28 U.S.C. §§ 1913, 1917; Court of Appeals Miscellaneous Fee Schedule §§ 1, 11 (Nov. 1, 2011). Alternatively, Petitioner may file a motion for leave to proceed *in forma pauperis* in the Court of Appeals pursuant to the requirement set forth in FED. R. APP. P. 24(a)(5).

The Court also must decide whether grant a certificate of appealability. Under the amended provisions of the Habeas Corpus Act, a petitioner may not appeal in a habeas case unless

a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). Amended Rule 22 of the Federal Rules of Appellate Procedure extends to district judges the authority to issue a certificate of appealability. FED. R. APP. P. 22(b). *See Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir. 1997). The filing of a notice of appeal that does not specify the issues that petitioner seeks to have reviewed on appeal will be deemed a request for review of all issues. *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997) (Admin. Ord.). Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if petitioner has demonstrated a “substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

To warrant a grant of the certificate, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003). In applying this standard, the court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of petitioner’s claims. *Id.*

Applying this standard, this Court finds no basis for issuance of a certificate of appealability. The Court already has rejected Petitioner’s claims of constitutional error under the standards set forth in the Antiterrorism and Death Penalty Act. Petitioner has not pointed to any flaw in the Court’s reasoning or any issue of fact or law overlooked in the adjudication of his petition. The Court finds that reasonable jurists could not conclude that this Court’s dismissal of

Petitioner's claims was debatable or wrong, or that Petitioner was entitled to relief from the Court's judgment. Therefore, the Court denies Petitioner a certificate of appealability. Accordingly:

IT IS ORDERED that Petitioner's motion for leave to proceed *in forma pauperis* on appeal (docket #96) is DENIED. The Court certifies that the appeal is not taken in good faith. If Petitioner wishes to proceed with his appeal, he must pay the \$505.00 appellate fee to the Clerk of this Court within 28 days of this order. *See* 28 U.S.C. §§ 1913, 1917; Court of Appeals Miscellaneous Fee Schedule §§ 1, 11 (Nov. 1, 2011). Alternatively, Petitioner may file a motion for leave to proceed *in forma pauperis* in the Court of Appeals pursuant to the requirement set forth in FED. R. APP. P. 24(a)(5).

IT IS FURTHER ORDERED that Petitioner's motion for certificate of appealability (docket # 97) is DENIED.

Date: December 11, 2013

/s/ Paul L. Maloney  
Paul L. Maloney  
Chief United States District Judge